

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Summary of Argument	7
Reasons for not granting the writ	7
Argument	8
I. No important question of appellate practice is presented	8
II. The decision of the Circuit Court of Appeals is not in conflict with any applicable decision of this Court or with the decisions of other federal courts or state courts, and these cases present no important question in the law of corporate securities	11
III. The decision of the Circuit Court of Appeals does not cause the imposition of a forfeiture	16
Conclusion	19

TABLE OF AUTHORITIES CITED.

	Page
Allyn v. Dreher, 124 Neb. 342, 246 N. W. 731	19
Anderson v. Pennsylvania Hotel Co., 56 F. (2d) 980	13, 15
Atherton v. Tesch, 202 Ala. 448, 80 So. 832	19
Baker v. Meloy, 95 Md. 1, 51 Atl. 893	16
Carson v. Nuzman, 117 Kan. 395, 232 Pac. 242	18, 19
Chicago Title & Trust Co. v. Hoffberg, 293 Ill. App. 290, 12 N. E. (2d) 230	12, 15
Chisholm-Ryder Co. v. Buck, 65 F. (2d) 735 (C. C. A. 4th Cir.)	9

	Page
Farmers Loan & Trust Co. v. Iowa Water Co., 78 Fed. 881,	15
Ferree v. New York Security & Trust Company, 74 Fed.	
769 (C. C. A. 8th)	15
First Trust Company of Lincoln, Nebraska v. Ricketts, 75	
F. (2d) 309 (C. C. A. 8th)	16
Ketchum v. Duncan, 96 U. S. 659	7, 12, 13, 15
Lake View Trust & Savings Bank v. Joseph P. Rice, 279	
Ill. App. 538	16
Lloyd, Trustee v. Wagner, 93 Ky. 644, 21 S. W. 334	16
Lyman v. Stevens, 123 Conn. 591	14
Martin v. Bank, 94 Tenn. 176, 28 S. W. 1097	16
Morton Trust Company v. Home Telephone Company, 66	
N. J. Eq. 106, 57 Atl. 1020	16
Security Trust Company v. American Investment Company,	
34 N. M. 551, 286 Pac. 159	16
Union Trust Company v. Monticello & Port Jervis Railway	
Co., 63 N. Y. 311	16
Venner v. Farmers Loan and Trust Co. of New York, 90	
Fed. 348 (C. C. A. 6th)	16
Wood v. Guaranty Trust Company, 128 U. S. 416	15
Cook on Corporations (8th Ed.) s. 771	16
McLelland and Fisher, Law of Corporate Mortgage Bond	
Issues (1937) p. 508	16
Tracy, Corporate Foreclosure (1929) s. 253	16
Federal Rules of Civil Procedure, Rule 75	8
Federal Rules of Civil Procedure, Rule 75(h)	8

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 506.

A. B. & M. LIQUIDATION CORPORATION,
PETITIONER,

v.

PELHAM HALL COMPANY ET AL.,
RESPONDENTS.

A. B. & M. LIQUIDATION CORPORATION,
PETITIONER,

v.

MYLES STANDISH COMPANY ET AL.,
RESPONDENTS.

BRIEF FOR THE RESPONDENTS, PELHAM HALL COMPANY, MYLES STANDISH COMPANY, FREDERICK G. CURRY AND WALTER J. SUGDEN, TRUSTEES, JAMES SUGDEN COMPANY, AND CATHERINE SUGDEN.

OPINIONS BELOW.

The opinion of the District Court is published in 28 F. Supp. 350. The opinion of the Circuit Court of Appeals is published in 112 F. (2d) 498. The petition for rehearing was denied without opinion.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 7, 1940. A petition for rehearing was filed in the Circuit Court of Appeals on June 21, 1940 and was

denied July 15, 1940. The petition for certiorari was filed October 14, 1940. The jurisdiction of this court is sought to be invoked under Section 240 (a) of the Judicial Code as amended.

QUESTIONS PRESENTED.

1. Whether or not a Circuit Court of Appeals may examine exhibits introduced in the District Court but not certified to the Circuit Court as a part of the record on appeal.

2. Where securities are issued under a trust mortgage providing that if the issuer fails to pay any bond or coupon secured by the mortgage the broker, which is also the paying agent, may purchase and hold such securities without these securities becoming subordinated to the other outstanding bonds and coupons of the same issue, and the broker or paying agent, in reliance upon that provision, takes up with its own money bonds and coupons as they fall due intending to purchase but without giving to the holders from whom such securities are taken up any notice of its intention to purchase, so that the holders believe that the bonds and coupons are being paid and not purchased, does that transaction constitute a purchase within the meaning of the provisions of the trust mortgage?

3. If on the facts stated in the preceding question, failure to give the notice there referred to does not constitute a purchase, does the presentation of a resale order with respect to bonds alone but not with respect to coupons constitute a notice on the part of the paying agent of its intention to exercise an option to purchase such bonds on its own account?

STATEMENT.

These two cases were brought by the A. B. & M. Liquidation Corporation, the plaintiff below, as transferee of the assets of the American Bond and Mortgage Company, Inc., to establish the parity of and its right to share in the security underlying coupons with a face value of approxi-

mately \$114,000 and bonds with a face value of approximately \$31,000 in the Pelham Hall case, and coupons with a face value of approximately \$171,000 and bonds with a face value of approximately \$62,000 in the Myles Standish case. The coupons and bonds came into the hands of the A. B. & M. Liquidation Corporation by virtue of a decree of the Bankruptcy Court for the Eastern District of Illinois dated July 20, 1934, entered in connection with a composition offer made by the American Bond and Mortgage Company in its bankruptcy proceedings. (Agreed statement of facts in the Pelham Hall case, R., p. 19, and in the Myles Standish case, R., p. 82.) These bonds were originally issued by a corporation known as The Pelham Hall, Inc. in the Pelham Hall case and by a corporation known as The Myles Standish, Inc. in the Myles Standish case. The indentures show that they were executed by the borrower and by a corporate trustee and an individual trustee. In addition to the actual parties to these indentures, the indentures throughout refer to the American Bond and Mortgage Company and make it the paying agent of the mortgagors for the sums coming due on coupons and principal maturities from time to time and also confer upon it certain rights and duties in connection with monthly instalments of interest, principal, and income taxes which under the indentures were to be paid to the American Bond and Mortgage Company as further security for the performance of the covenants under the indenture by the mortgagors. (R., pp. 39, 40, 44 and 45.) The indentures in each case also provided that the mortgaged property should be held for the equal protection of all the bonds and coupons. (R., pp. 39, 44 and 45.) The indentures also contained a provision which authorized the American Bond and Mortgage Company to purchase any coupon or bond which had not been paid on its due date and to hold that coupon or bond unsubordinated. (R., pp. 40 and 41.) It is these provisions in the

indentures upon which the plaintiff relies, and which were considered by the District Court and the Circuit Court of Appeals in drawing their conclusions of law. Both obligors failed to make the monthly payments required under the indenture. When the fifth coupon matured March 1, 1928, and subsequent ones matured September 1, 1928, and March 1, 1929, in the Pelham Hall case and the fourth coupon matured June 1, 1927, and subsequent ones came due December 1, 1927, June 1, 1928, and December 1, 1928, in the Myles Standish case, the American Bond and Mortgage Company had not been provided with funds to pay them. Nor were funds provided under either issue to meet the principal maturities which fell due in the Pelham Hall case on September 1, 1928 and March 1, 1929, or in the Myles Standish case on June 1, 1927, December 1, 1927, June 1, 1928 and December 1, 1928. Nonetheless, when these coupons and matured bonds were presented to the American Bond and Mortgage Company for payment, the American Bond and Mortgage Company, without any notice to the person presenting them, advanced from its own funds the face amount of these bonds and coupons. (Agreed statement of facts in the Pelham Hall case, paragraph 14, R., pp. 17 and 18, and in the Myles Standish case the agreed statement of facts, paragraph 11, R., pp. 79 through 81. For the finding as to the lack of notice to or knowledge of the persons presenting the coupons for payment, see the opinion of the District Court in paragraphs 2, 3, 4 and 5, R., pp. 48-50 incl.) The American Bond and Mortgage Company also paid the 2% Federal Tax due on the coupons so presented and taken up, and refunded to coupon holders the amount of State income taxes due. (R., p. 57.) In the Pelham Hall case, the first notice the bondholders had of any default was on August 22, 1929 when the American Bond and Mortgage Company so notified them, and this was notice *not of non-payment of past coupons but of a*

future coupon. (Paragraph 9 of the opinion of the District Court, R., pp. 42 and 43. As to the Myles Standish case, see paragraph 6 of the opinion, R., p. 46.) The respondent believes it important to point out that similar advances had been made in the Pelham Hall case for the coupons maturing March 1, 1927 and September 1, 1927, but the funds advanced for these coupons were repaid by the issuer and no question is raised as to them. (R., p. 17.) In the Myles Standish case, interest coupons due December 1, 1926 were paid from funds supplied by The Myles Standish, Inc. In both cases the coupons coming due in the first year were paid from funds reserved from the sale of bonds all as provided in the brokerage contracts. (See R., p. 16 in the Pelham Hall case and p. 79 in the Myles Standish case.)

Subsequent to the notices of default above referred to, the mortgages were foreclosed and eventually a plan of reorganization worked out with reference to each bond issue under which the mortgaged property was transferred in the Pelham Hall case to the Pelham Hall Company and in the Myles Standish case to the Myles Standish Company. The bondholders of The Pelham Hall, Inc. were given voting trust certificates representing shares of stock in the new company for their old bonds and coupons and the same procedure was followed in the Myles Standish case. The plans are briefly summarized in the opinion of the District Court. (R., pp. 43 and 47.)

The District Court opinion is found at pages 38 through 55 of the record. The District Court remarked that the decision depended upon the particular facts of the case (R., p. 51) and then discussed the indenture provisions, and, relying upon the fact that the bonds were construction bonds and that the indenture permitted the purchase of the coupons and bonds, concluded that the plaintiff should prevail. The opinion of the Circuit Court of Appeals is found

at pages 105 through 115 of the record. The Circuit Court of Appeals relied upon the fact that no notice of any description was given to the owners of the coupons and that the notice given to owners of the bonds which were presented for payment was given only after the actual presentation of the bond. The Circuit Court of Appeals also stressed the fact that the American Bond and Mortgage Company paid the Federal Income Tax due at the source on interest paid and refunded the State Income Tax due on interest paid to the holders of the coupons. (R., p. 108.) The Circuit Court then concluded (R., pp. 110 and 111) that the clause of the indenture relied upon by the district judge did not permit the American Bond and Mortgage Company to take up coupons and hold them unsubordinated without notice to the coupon holders. The Circuit Court arrived at the same conclusion with reference to matured bonds and further ruled that the so-called resale authorities were vague and indefinite in their terms and did not constitute adequate notice. The Circuit Court further relied on the fact that these notices, whatever may have been the proper interpretation of them, could not in any event serve as adequate notice because they were not given until after the bonds had been presented for payment. (R., p. 113.)

After the handing down of this decision, the petitioner filed motions for rehearing (R., p. 113) which were denied.

The petition in this court was filed on October 14, 1940.

With reference to the petitioner's statement of facts, the respondent respectfully calls the attention of this Court to the fact that in several instances the petitioner has used therein the words "purchase" and "payment". The question of whether or not the transaction constituted a purchase is the issue in the case and words assuming a conclusion should not be used. The petitioner on page 8 of its petition states that "the defendants other than the Boston Safe Deposit and Trust Company and the interveners ap-

peal." The interveners did appeal (R., pp. 59 and 101) and the materiality of this appeal will be discussed in this brief.

The petitioner on page 2 of its petition states that "except for the proceeds of the sale of these bonds neither corporation had any material resources." This is not a fact which appears in the record of these cases.

It must also be pointed out that although it may perhaps be inferred from the opinion of the Circuit Court of Appeals that at some time that court inspected the so-called resale authorities, there is nothing whatever in the record which justifies the statements made on page 8 of the petitioner's petition. So far as the record in this case is concerned, it does not appear (except as may be inferred from the language of the decision) that the Circuit Court of Appeals ever had in its possession the resale authorities, or if it did have them, when it had them, or what weight it gave to them.

SUMMARY OF ARGUMENT.

Certiorari should not be granted in this case because:

1. No important question of Appellate practice is involved in the inspection by the Circuit Court of Appeals of the resale authorities, because this inspection, if it were made, is authorized by Rule 75h of the Rules of Civil Procedure.
2. The decision of the Circuit Court of Appeals is not in conflict with any applicable decision of this Court or with the decision of another Circuit Court of Appeals or state court on the same matter, and no important question in the law of corporate securities is presented by the decision of the Circuit Court of Appeals, because its decision was based upon the facts as found by the district judge, and is strictly in conformity with the position of this Court in the case of *Ketchum v. Duncan*, 96 U.S. 659.

3. The decision of the Circuit Court of Appeals is not inequitable as causing the petitioner to be subjected to a forfeiture. The actions of the petitioner's predecessor by which the petitioner is bound were in themselves inequitable and any loss properly falls upon the petitioner and not upon the innocent holders of bonds and coupons.

ARGUMENT.

I.

The use by the Circuit Court of Appeals of an exhibit not incorporated in the formal record was proper. Whether in view of Rule 75 of the Rules of Civil Procedure the petitioner has any right to raise a question not appearing in the record may well be doubted. If, however, the petitioner may now properly raise the question of the propriety of the examination by the Circuit Court of Appeals of certain exhibits introduced in evidence before the District Court and not certified as a part of the record on appeal (if, in fact, the Circuit Court of Appeals did examine such exhibits), that question is answered by 75h of the Rules of Civil Procedure for the District Courts which provides in part as follows (*italics supplied*):

"If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the District Court, either before or after the record is transmitted to the Appellate Court, or the Appellate Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record shall be certified and transmitted by the Clerk of the District Court."

The italicized portion of the above quotation answers fully the objection raised by the petitioner. There is no doubt that the resale authorities were introduced in evidence; in fact, they were introduced by the petitioner. The

petitioner was afforded every opportunity to interrogate with respect to them. The petitioner on page 16 of its petition cites the case of *Chisholm-Ryder Co. v. Buck*, 65 F. (2d) 735 (C.C.A. 4th Cir.). In that case the Circuit Court of Appeals examined a document which was not offered at the trial or introduced in evidence. The distinction between that case and the present case is obvious.

There is no formal order entered on the docket of the Circuit Court of Appeals instructing the Clerk of the District Court to transmit the resale authorities to the Circuit Court of Appeals but this is unnecessary in view of the provision in Rule 75h which does not *require* the certification of a supplemental record by the Clerk of the District Court but merely provides for such a supplemental record if necessary. It clearly lies within the discretion of the Circuit Court of Appeals to determine whether or not such formal certification is necessary. In the present case, it is obvious that the Circuit Court of Appeals did not consider it necessary.

Either the petitioner or the respondents could have included the resale authorities in the record on appeal. Neither party did so. The resale authorities were written documents and even though the petitioner may have omitted to argue their effect in the original hearing before the Circuit Court of Appeals, yet the petitioner must have assumed when the petition for rehearing was presented that the Circuit Court of Appeals had examined the resale authorities and at that time the petitioner had every opportunity to argue the proper construction of the resale authorities. The denial of the petition for rehearing justifies the assumption that the petitioner's arguments as to the resale authorities were insufficient to cause the Circuit Court of Appeals to alter its opinion.

If the Circuit Court of Appeals did direct that these exhibits be transmitted to it and if it did examine them, then

the Circuit Court of Appeals, acting under the authority conferred upon it by Rule 75h, did make the resale authorities a part of the record on appeal. If this was done after the filing of the briefs in the Circuit Court of Appeals and after the oral argument in that Court, although this does not appear as a matter of record, it was, in any event, done before the filing of the petitioner's motion for rehearing and the petitioner has therefore not been deprived of its opportunity to argue the sufficiency of the resale authorities.

Even if this court believes that the action of the Circuit Court of Appeals did not make the resale authorities a part of the record or that the certification of a supplemental record to include the resale authorities was a necessary procedure to be taken by the Circuit Court of Appeals, nevertheless, certiorari should not be granted in this case as the inspection of the resale authorities by the Circuit Court of Appeals did not affect its decision. The record as it originally stood and as presented to this Court discloses the manner in which the resale authorities were used. They were not used at all with respect to coupons and were not used by the holders of matured bonds when they were presented for payment. They were used only *after* a bond had been presented to American Bond and Mortgage Company, and then in some instances signatures were requested by that company from correspondent banks and in some instances from customers personally presenting their bonds for payment. (R., pp. 49, 113.) The Circuit Court of Appeals has stated clearly that the question as to whether the transaction constituted a purchase or payment was one to be determined at the time the bonds were presented for payment. The character of the transaction became irrevocably fixed when the bonds were presented. (R., p. 113.) The use by American Bond and Mortgage Company of a resale authority at some date subsequent to

the presentation of the bonds for payment even though closely following such presentation is insufficient. Therefore, whatever may have been the proper interpretation of the language of the resale authorities, the Circuit Court of Appeals has found they were not effective as notice because they were not given to any bondholders until after the time when the character of the transaction became fixed. (R., p. 113.) While it is true that the Circuit Court of Appeals characterized the resale blanks as "somewhat vague and technical in their terms" its decision was based primarily upon the fact that the use of the resale authorities was too late and it is obvious that the Circuit Court of Appeals would have reached the same decision whether or not it had inspected the resale authorities. It is, therefore, respectfully submitted by the respondents that whether or not the Circuit Court of Appeals erred in examining the resale authorities, if it did so, such error was not prejudicial to the petitioner.

II.

The basic question involved in the present litigation presents no problem of general concern to those interested in the ownership or flotation of corporate securities. The problem here presented is one of the construction of the language of particular indentures. The District Court properly so assumed (R. p. 51), as did the Circuit Court of Appeals. (R., p. 107.) The petitioner has relied upon that clause of the indentures, identical in both cases, which permitted the American Bond and Mortgage Company, the petitioner's predecessor, under certain circumstances to purchase bonds and coupons and to hold them unsubordinated. The only question is whether or not the American Bond and Mortgage Company did purchase within the meaning of that indenture clause. The Circuit Court of Appeals has held that upon the facts found by the district

court and appearing in the record, the American Bond and Mortgage Company did not purchase the bonds and coupons in litigation. That decision involves no problem in the law of corporate securities meriting any further adjudication. It is a matter wholly concerned with the interpretation of these particular indentures, and the acts done by the petitioner's predecessor. That this is true is clearly shown in the opinion of the Circuit Court of Appeals, as that court indicated that if the indentures had contained provisions similar to those in the indenture discussed in *Chicago Title & Trust Co. v. Hoffberg*, 293 Ill. App. 290, 12 N.E. (2d) 230, a different result might well have been reached. (R., p. 111.) The problem presented in the present cases is not one of purchase or payment but merely whether or not a purchase was made under the provisions of these indentures. "Purchase" or "payment" are not necessary alternatives. The Circuit Court of Appeals in holding that the American Bond and Mortgage Company was not in the position of a purchaser of the coupons and bonds here involved did not hold they were paid, nor need it have done so.

The petitioner argues that the decision of the Circuit Court of Appeals failed to give proper effect to *Ketchum v. Duncan*, 96 U.S. 659. On the contrary the Circuit Court of Appeals considered the case of *Ketchum v. Duncan* with great care, quoted, extensively from its language (R., pp. 109, 110) and found expressly that the facts of the present cases were quite different. The Circuit Court of Appeals said in that respect (R., p. 110):

"The payment of the coupons in the *Duncan* case was held not to extinguish them because the circumstances of that case warranted the presumption 'that both parties supposed and expected that the coupons remaining uncanceled would be preserved and held as claims against the railroad company'. The circumstances here are quite different. The District Court

found that the coupons were 'paid at the place they were to be paid and by the party who was to pay them and were paid at approximately the time when they should have been paid; that they were paid without notice to the holder or person presenting them that they were being purchased.'

"No notice was given to the holders of the securities of any purpose on the part of the Mortgage Company to purchase and nothing occurred which 'should have awakened their attention and led them to inquire.' Every appearance of purchase was avoided. The natural belief from all the circumstances that the coupons were being paid and not purchased was also encouraged by the fact that the Mortgage Company paid the necessary state and federal income taxes, which are only payable when interest is being paid and not when interest coupons are bought and sold."

Not only is it true that the facts in *Ketchum v. Duncan* were dissimilar to those in the instant cases, but the reasoning of this Court in *Ketchum v. Duncan* when applied to the facts of the present cases leads to the same result arrived at by the Circuit Court of Appeals. The decision of the Circuit Court of Appeals does not leave the application of *Ketchum v. Duncan* uncertain.

The petitioner also claims that there is an apparent conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Anderson v. Pennsylvania Hotel Co.*, 56 F. (2d) 980 and the decision of the Circuit Court of Appeals in the present cases. In the first place, there can be no conflict between the two decisions in so far as coupons are concerned as the *Anderson* case involved only matured bonds and did not involve coupons. In *Anderson v. Pennsylvania Hotel Co.* the court recognized that the case of coupons differed from the matured bonds which were under consideration in that case because the holder of coupons which have been taken up remains interested in the security underlying the other coupons and bonds which he owns. (*Anderson v. Pennsylvania Hotel*

Co., 56 F. (2d) 980, at 983.) Secondly, with respect to matured bonds the basis of the decision in the *Anderson* case is that it did not appear in that case that any person whose bond was taken up had any further interest in the security or held any other bonds of the same issue. In the instant cases, the interveners were holders of other bonds of the same issue and they were permitted to intervene not only on their own behalf but on behalf of other bondholders, many of whom held other bonds of the same issue. (R. pp. 24, 25, 31, 86, 87, and 93.) This obvious factual difference is a fundamental distinction between the present decision and the *Anderson* decision and there is no apparent or actual conflict with respect to the problems of law decided by the two Circuit Courts of Appeals. Furthermore, the requirement of notice stated by the Circuit Court of Appeals in its opinion in the present case and set out on page 21 of the petitioner's brief in support of its petition is not a requirement *dehors* the mortgage indenture or implied by the contract between the issuers and the bondholders. It must be remembered that the petitioner is seeking to establish its right as assignee from a purchaser and it is therefore clearly encumbent upon the petitioner's assignor to do those things necessary legally to constitute a purchase. Adequate notice of intention to purchase is clearly a necessary requisite.

The decision in *Lyman v. Stevens*, 123 Conn. 591 is not in irreconcilable conflict with the decision of the first circuit. Rather the two cases are entirely consistent. The mortgage indenture in *Lyman v. Stevens* contained a provision allowing the indenture trustee to advance principal or interest not paid by the issuer and specifically provided that the trustees should be subrogated to the rights of the bondholders to the extent of such advances. The trustee therein was given a right to make advances, not merely a right to purchase.

Chicago Title and Trust Co. v. Hoffberg, 293 Ill. App. 290 is also wholly consistent with the present decision. As has been pointed out above in the respondents' brief and as the Circuit Court of Appeals itself recognized (R., p. 111) the indenture clause with which the court was concerned in *Chicago Title and Trust Co. v. Hoffberg* specifically provided that if the trustee bank advanced its own funds for bonds or coupons, such bonds or coupons "shall thereupon be deemed to have been purchased . . . and it shall be unnecessary to give notice of any such purchase to the mortgagor or to the holders of other bonds or coupons secured hereby or to anyone else. . . ."

The requirement of the *Hoffberg* case of proof of ownership of other bonds and coupons by those objecting to parity is fully met by the respondents in the present cases. (R., pp. 24, 25, 21 and 86, 87, 93.)

Far from there being any mist of uncertainty arising from the present decision, the almost uniform course of decisions of both state and United States courts has been to deny parity to bonds and coupons taken up in a manner similar to the method used in the present cases, in the absence of unusual circumstances such as were found to exist in *Ketchum v. Duncan*, *supra*, and *Anderson v. Pennsylvania Hotel Co.*, *supra*, and in the absence of such unusual indenture provisions as were contained in *Chicago Title and Trust Co. v. Hoffberg*, *supra*. The following are cases which conclusively demonstrate that the decision of the Circuit Court of Appeals in the present cases is in accord with the uniform course of decisions.

Wood v. Guaranty Trust Company, 128 U.S. 416.

Ferree v. New York Security & Trust Company,
74 Fed. 769 (C.C.A. 8th).

Farmers Loan & Trust Co. v. Iowa Water Co., 78
Fed. 881.

- Venner v. Farmers Loan and Trust Co. of New York*, 90 Fed. 348 (C.C.A. 6th).
First Trust Company of Lincoln, Nebraska v. Ricketts, 75 F. (2d) 309 (C.C.A. 8th).
Martin v. Bank, 94 Tenn. 176, 28 S.W. 1097.
Morton Trust Company v. Home Telephone Company, 66 N.J.Eq. 106, 57 Atl. 1020.
Baker v. Meloy, 95 Md. 1, 51 Atl. 893.
Union Trust Company v. Monticello & Port Jervis Railway Co., 63 N.Y. 311.
Lloyd, Trustee v. Wagner, 93 Ky. 644, 21 S.W. 334.
Security Trust Company v. American Investment Company, 34 N.M. 551, 286 Pac. 159.
Lake View Trust & Savings Bank v. Joseph P. Rice, 279 Ill. App. 538.
Tracy, Corporate Foreclosures (1929) s. 253.
Cook on Corporations (8th Ed.) s. 771.
McLelland and Fisher, "Law of Corporate Mortgage Bond Issues" (1937) p. 508.

III.

The decision below does not result in an imposition of a forfeiture. The petitioner claims that on the record there is a grave miscarriage of justice justifying this court in granting a writ of certiorari. It is clear in the first place that the petitioner can stand in no better position than its assignor, the American Bond and Mortgage Company.

The petitioner refers at some length to the good faith of American Bond and Mortgage Company and to the fact that the bonds were labelled "construction bonds" upon their face. In so arguing the petitioner overlooks the fact that the first year's instalments of interest were withheld by American Bond and Mortgage Company from the proceeds of the sale of the bonds and also overlooks the fact that there were no early maturities of principal. (R., pp. 16,

79.) The first principal maturity in either case was two years after the date of the bond issue.

The petitioner reminds the Court that these cases are in equity. Therefore the findings of the Circuit Court of Appeals that when the American Bond and Mortgage Company took up maturing bonds and coupons without notice that they were being paid from funds supplied by the mortgage company "it was obviously to the advantage of the mortgage company not to disclose the true situation as it was dealing in these very bonds and also selling its own debentures" (R., p. 107) is properly a matter to be considered upon any claim of forfeiture. The Circuit Court of Appeals also stated "in the absence of language dispensing with notice, a construction is justified and called for which lends protection to the purchaser of securities and tends to reduce the opportunities for sharp practice and deceit in such transactions where knowledge of pertinent facts is withheld from the public." (R., p. 112.) If anything further need be said with respect to the relative equities involved, the language of the district court is pertinent. "Obviously the mortgage company was not advertising the fact that these bonds were in default. Its business was selling such real estate bonds." (R., p. 50.) The statements of the petitioner on page 24 of its brief in support of its petition that "The bondholders took its money quite happily. No offer has ever been made to return one penny of the money," are entirely unwarranted by anything that appears in the record. It is an agreed fact that the interveners in these cases held other bonds of these issues and as a result of reorganization now hold voting trust certificates representing these bonds. (R., pp. 31, 93.) The judge of the district court found it to be a fact that many of the bondholders whose matured bonds and coupons were paid were holders of bonds at the time of the foreclosure and participated in the plan of reorgani-

zation. (R., p. 50.) It is obvious that if the petitioner is permitted to prevail the proportionate holdings of the interveners and other stockholders will be greatly reduced and the value of their holdings correspondingly decreased. There is no reason why such a loss to the former bondholders who are now stockholders would not be as much a forfeiture as for the loss to remain where it is. As has been pointed out, the motives of the American Bond and Mortgage Company in acquiring these bonds and coupons were not entirely disinterested. The American Bond and Mortgage Company was dealing in these very bonds and selling its own debentures (R., p. 107) and the American Bond and Mortgage Company had an interest in concealing the failure of the mortgagor to meet its obligations. (R., p. 52.) With reference to the Pelham Hall case, the American Bond and Mortgage Company owned all of the stock of the issuer. (R., p. 15.) Nor, as has been pointed out, can the present petitioner stand in any better position than its assignor, the American Bond and Mortgage Company.

Carson v. Nuzman, 117 Kan. 395, at 397, 232 Pac. 242.

That there will be less for the creditors of American Bond and Mortgage Company because of the decision of the Circuit Court of Appeals than there would have been if the bonds and coupons in issue were allowed to participate in the reorganizations upon a parity with the bonds held by the public may be unfortunate for those creditors, but to grant such parity would be unfortunate for the bondholders who acted in good faith and believed that the bonds and coupons presented by them to American Bond and Mortgage Company had been paid.

The word "forfeiture" as used by the petitioner is hardly accurate. The petitioner still has a legal right against the original issuers of these bonds and coupons. The decision does not hold that these bonds and coupons are

paid with respect to the original issuers and whether this remedy of the petitioner against the original issuers will result in a substantial recovery or in no recovery at all is not material. When there is a remedy, even though that remedy may be against a worthless debtor, there is no forfeiture. Had the original issuers succeeded in repaying to American Bond and Mortgage Company the amounts it advanced, as in fact was done with respect to two maturities of coupons so taken up (R., p. 17) there would have been no complaint. The cry of forfeiture is now raised only because American Bond and Mortgage Company over-estimated the ability of the original issuers of these bonds to earn money and thus reimburse American Bond and Mortgage Company.

In several cases involving similar facts the courts have said that the remedy of the person picking up the coupons is not a right to share in the security on a parity with the innocent holders of bonds and coupons but is a right to come in ahead of general creditors or junior lienors.

Allyn v. Dreher, 124 Neb. 342, 246 N.W. 731.

Atherton v. Tesch, 202 Ala. 448, 80 So. 832.

Carson v. Nuzman, 117 Kan. 395, 232 Pac. 242.

CONCLUSION.

The respondent respectfully urges that the petition for certiorari be denied in view of the facts that:

1. Petitioner has not adduced any authority which casts doubt upon the correctness of the decision of the Circuit Court of Appeals.

2. No conflict of authority is shown to be involved nor is any novel question of law presented.

Respectfully submitted,

ROBERT H. DAVISON,

Attorney for the Respondents.